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No. 141

In the Supreme Court of the United States

OCTOBER TERM, 1963

NATIONAL LABOR RELATION BOARD,
Petitioner

vs.

SERVETTE, INC.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Motion for Leave to File a Brief Amici Curiae, and Brief Amici Curiae, of American Federation of Television and Radio Artists, San Francisco Local, and National Association of Broadcast Employees and Technicians, Local 55.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

American Federation of Television and Radio Artists, San Francisco Local, and National Association of Broadcast Employees and Technicians, Local 55, hereafter referred to as AFTRA and NABET, respectively, move the Court for an order granting leave to file a brief amici curiae in the above-entitled case. The brief which this motion seeks to have filed and considered in

the disposition of this case appears in full *infra*, in the pages following the motion. The brief discusses the following two questions: (1) whether the handbilling activity in this case falls within the proscription of Section 8(b)(4)(ii) of the National Labor Relations Act, and (2) whether in any event such activity is protected by the First Amendment to the Constitution. In support of this motion, it is shown as follows:

1. The second question presented by the Board's petition for a writ of certiorari relates to the lawfulness, under Section 8(b)(4)(ii)(B) of the National Labor Relations Act, of passing out union leaflets to the public requesting consumers not to purchase products of a wholesaler with which the union has a labor dispute. The Board has ruled that the "publicity proviso" to Section 8(b)(4)(B) exempts such handbilling from the proscription of that Section. In disagreeing with the Board's ruling, the court below relied on its earlier decision in *Great Western Broadcasting Corporation v. N.L.R.B.*, 310 F. 2d 591 (C.A.9). AFTRA and NABET were parties respondent before the Board in the latter case, and participated as intervenors in the proceeding before the Court of Appeals for the Ninth Circuit which was instituted by Great Western Broadcasting Corporation (the charging party before the Board) to review the Board's dismissal of the complaint against AFTRA and NABET.

The Ninth Circuit held in the *Great Western* case that the publicity proviso exempts handbilling activity from Section 8(b)(4)(B) of the Act only where the employer involved in the labor dispute is a manufacturer of a physical product. The employer in *Great Western* operated a television station. The Ninth Circuit, however, declined to direct the entry of a remedial order, noting that AFTRA and NABET had advanced the contentions that the handbilling in *Great Western* was lawful irrespective of the applicability of the publicity proviso on the grounds that (1) such activity is constitutionally protected, and (2) the proscription in Section 8(b)(4)(ii) against threats, coercion and restraint did not in any event encompass such handbilling activity. The case was

remanded to the Board for consideration of these questions (Pet. for Cert., 37a).

The *Great Western* case is presently pending before the Board pursuant to the remand order. Briefs of the parties have been filed, but a decision has not been entered.

2. The questions which were formally referred back to the Board in the *Great Western* case are before the Court in the present case. Thus, in resting its decision in this case on the application of the publicity proviso, the Board determined as a threshold matter that the handbilling would constitute threats, coercion and restraint within the meaning of Section 8(b)(4)(ii) of the Act except for the effect of the proviso. The Board made this clear in its decision in the present case, by predicating its ruling as to the handbilling question "on the basis of our recent Lohman Sales Company decision" (R. 38). In *Lohman Sales Company*, 132 NLRB 901, 904, the Board stated, before turning to the applicability of the publicity proviso, that in the absence of the proviso language the handbilling "might constitute restraint and coercion". See also the Board's statement in *Local 662, Radio and Television Engineers (Middle South Broadcasting Co.)*, 133 NLRB 1698, 1705: "We also agree with [the trial examiner's] finding that, unless protected by the proviso to Section 8(b)(4), Respondent's circulation and distribution of the 'Do Not Patronize' leaflets urging a consumer boycott of secondary employers still advertising on [the struck radio station], would constitute 'restraint or coercion' within the meaning of Section 8(b)(4)(ii)(B) and a violation of that Section." As its Petition indicates (p. 12), the Board considers it an essential premise to its position in this case that Section 8(b)(4)(ii) of the Act would proscribe the handbilling involved here but for the saving language in the proviso. The brief amici curiae of AFTRA and NABET is directed to this premise of the Board's position.

3. Following the decision and remand order of the Court below in this case, the Board filed a Motion for Clarification of Remand in which it requested that the court "make clear that

on the remand, the Board may determine whether the handbilling constituted a threat, restraint or coercion within the meaning of Section 8(b)(4)(ii) of the Act, or was constitutionally protected free speech" (R. 101). The court below denied the motion on the ground that these questions were precluded from consideration by Section 10(e) of the Act.* This ruling, which we believe erroneous, required the Board to seek this Court's review without a fuller decisional statement of its views on the two contentions involved, but does not preclude consideration by this Court of the questions to which the contentions are directed.

Thus, as shown above, the Board treated the question of the applicability of Section 8(b)(4)(ii) of the Act as presented on the record before it, and has stated its views both by reference in its decision to the *Lohman Sales Company* case, *supra*, p. 3, and also in other decisions. There is no occasion in these circumstances to invoke the policy of Section 10(e) "of affording the Board opportunity to consider on the merits questions to be urged upon review of its order". *Marshall Field & Co. v. National Labor Relations Board*, 318 U.S. 253, 256. Accordingly, there is "no reason to hold [this Court's] hand at this juncture in order that the Board may arrive again at what is now a foregone conclusion". *Retail Clerks International Association, Local 1623 v. Schermerhorn*, 373 U.S. 746. The applicability of Section 8(b)(4)(ii) in this case presents a threshold issue which is integrally related to the interpretation of the proviso, and which requires consideration, if the Board's position on the proviso is not accepted, in order to resolve the general question presented by the Petition as to the lawfulness of handbilling in the circumstances of this case. Determination of all subsidiary issues encompassed by the question presented is fully appropriate in such circumstances. Compare, *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 331 U.S. 416, 427-428;

*Section 10(e) provides that: "No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

Hormel v. Helvering, 312 U.S. 552, 556-557; *Leedom v. I.B.E.W. Local 108*, 278 F. 2d 237 (C.A. D.C.).*

4. In the absence of the proposed brief *amici curiae* dealing with the constitutional and "restraint and coercion" questions, there will be no opposition before the Court to the Board's position respecting these important issues. The interest of respondent in this case coincides with the position of the Board as to these matters. The labor organization which was respondent before the Board in this case did not intervene in the proceeding before the court below, and thus has no standing to intervene before this Court. There has been no indication that any other person or organization seeks to file a brief in opposition to the Board's views. A full statement of the considerations opposing the Board's views should be presented to the Court as to these questions.

5. The Solicitor General has expressed his consent in writing to the filing of the proposed brief. Consent has not been obtained from the respondent.

WHEREFORE, it is respectfully requested that this motion be granted.

September, 1963.

NEYHART & GRODIN
DUANE B. BEESON
Attorneys for AFTRA and NABET.

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*The appropriateness of consideration by this Court of the constitutional and statutory interpretation problems here involved is emphasized by the fact that closely analogous questions relating to picketing are also before the Court in *National Labor Relations Board v. Fruit & Vegetable Packers*, No. 88, which has been set for argument immediately preceding this case (R. 106).

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OPINIONS BELOW

The opinion of the court of appeals (R. 85-98) is reported at 310 F. 2d 659. The findings of fact, conclusions of law, and order of the Board (R. 36-41) are reported at 133 NLRB 1501.

JURISDICTION

The jurisdiction of this Court is based on 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended. The petition for certiorari was granted on June 10, 1963 (R. 106).

QUESTIONS PRESENTED

The second question presented by the petition for certiorari is whether the handbilling activity in this case is lawful under the National Labor Relations Act, as amended. This brief is restricted to a discussion of the following two subdivisions of this question: (1) whether the handbilling activity in this case is constitutionally protected against restraint by the First Amendment to the federal Constitution, and (2) whether, in any event, the handbilling activity falls outside the proscription of Section 8(b)(4)(ii) of the Act against threats, restraint and coercion.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and the First Amendment to the Constitution are set forth in the Appendix, *infra*, p. 31.

STATEMENT

The interest of amici curiae, as stated above, is limited to the ruling of the court below in reversing the Board's determination that the handbilling in this case did not violate Section 8(b)(4)(ii)(B) of the Act. The facts which underlie this phase of the case are uncontested, and may be briefly summarized as follows:

In February, 1960, Wholesale Delivery Drivers and Salesmen Union Local 848, hereafter called the Union, instituted a strike against Servette, Inc., a wholesale distributor of candy, and specialty merchandise in the Los Angeles metropolitan area (R. 18-19; 7, 8, 12). In furtherance of its strike, the Union visited a number of retail markets which handled products distributed by Servette and requested them to discontinue business relations with Servette during the strike. In some instances managers of the retail stores were told that handbills would be distributed in front of their premises if they did not cooperate with the Union. Several stores stopped handling Servette products, and handbills were in fact passed out at stores which continued to do business

with Servette (R. 20-22; 54-72, 76-81). The handbill which was distributed reads as follows (R. 20; 84):

> To the Patrons of This Store
>
> Wholesale Delivery Drivers & Salesmen's Local No. 848 urgently requests that you do not buy the following products distributed by Servette, Inc.
>
> Brach's Candy
> Servette Candy
> Good Season Salad Dressing
> Old London Products
>
> The Servette Company which distributes these products refuses to negotiate with the Union that represents its drivers. The Company is attempting to force the drivers to sign individual "Yellow Dog" contracts.
>
> These contracts will destroy the wages and working conditions that the drivers now enjoy, and will set them back 20 years in their struggle for decent wages and working conditions.
>
> The drivers of Servette appreciate your cooperation in this fight.

As far as the record shows, the handbilling was at all times orderly, and did not affect deliveries to the retail stores (R. 79).

ARGUMENT

Introductory statement—The Board dismissed the complaint in this case insofar as it pertains to the handbilling activity on the ground that the proviso to Section 8(b)(4) exempts from the proscriptions of that provision the kind of publicity campaign which the Union carried on at the retail stores. Amici curiae agree that the Board has correctly interpreted the proviso, and fully support the Board's position in that respect, as discussed in its brief. We contend, in addition, that there are two alternative reasons for concluding that the Union's handbilling activity is in all respects lawful. We discuss these considerations in this brief.

For purposes of this discussion the handbilling and the Union's warning to market managers that handbills would be distributed if they continued to handle Servette products, may be considered together. Thus, if the distribution of handbills is permissible, it is similarly permissible to advise the persons affected that such distribution will take place. Conversely, it may readily be conceded that, if the distribution is unlawful because it constitutes a coercive threat prohibited by the Act, the warnings would fall for the same reason. As observed by Mr. Justice Holmes in a landmark dissent (*Vegelahan v. Guntner*, 167 Mass. 92, 44 N.E. 1077, 1081):

> "... the word 'threats' often is used as if, when it appeared that threats had been made, it appeared unlawful conduct had begun. But it depends on what you threaten. As a general rule, even if subject to some exceptions, what you may do in a certain event you may threaten to do—that is, give warning of your intention to do—in that event, and thus allow the other person the chance of avoiding the consequence."

Accordingly, the contentions presented below are directed to the lawfulness of the circulation of the leaflets in this case. The answer to the question of distribution will govern as well the question of threating such distribution.

I. The Peaceful Circulation of Handbills Which Identify Persons Who Do Business with a Struck Employer Is Protected by the First Amendment to the Federal Constitution.

A. The Handbilling Activity in this Case Constitutes Freedom of Speech and the Press Within the Meaning of the First Amendment.

Public circulation of leaflets and pamphlets disseminating opinions and information concerning matters of vital public importance occupies a prominent position in the development of the Constitutional liberties protected by the First Amendment. As stated by Mr. Chief Justice Hughes (*Lowell v. Griffin*, 303 U.S. 442, 452):

> "The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic in defense of liberty, as the pamphlets of Thomas Paine and others in our history abundantly attest. The press in its historic connotation comprehends every source of publication which affords a vehicle of information and opinion . . . 'Liberty of circulating is as essential to that freedom [of expression] as liberty of publishing; indeed without the circulation, this publication would be of little value.'"

See also, *Smith v. California*, 361 U.S. 147, 150; *Jamison v. State of Texas*, 318 U.S. 413; *Talley v. California*, 362 U.S. 60.

It is no longer open to question, moreover, that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." *Thornhill v. Alabama*, 310 U.S. 88, 102, and cases cited. See also, *Thomas v. Collins*, 323 U.S. 506, 532. The *Thornhill* case, in which the principle was initially stated by this Court, involved picketing, and the course of decisional law in the years that followed has made clear that picketing is not in all situations to be equated with constitutionally protected speech. See e.g., *Bakery Drivers v. Wohl*, 315 U.S. 769, 775; *Teamsters Local 695 v. Vogt*, 354 U.S. 284. It is not open to challenge, however, that opinions and facts relating to labor controversies are no less the subject matter of protected free speech than the expression of political and economic views generally. Indeed, fourteen years after the *Thornhill* decision, this Court reversed on the basis of that decision a state court injunction against picketing upon application of an unparticularized statute broadly banning picketing irrespective of the role such conduct might play in "the dissemination of information concerning the facts of a labor dispute". See *Chauffeurs, Teamsters & Helpers Local 795 v. Newell*, 356 U.S. 341.

The aspects of picketing which justify its restraint in some situations, however, do not apply to handbilling directed to the public. Both kinds of labor union conduct may serve the func-

tion of informing the public of the positions of the disputants with respect to a labor dispute, and thus qualify for constitutional protection, but picketing also has "ingredients in it that differentiate it from speech". *Hughes v. Superior Court*, 339 U.S. 460, 465. As explained by the Court in *Bakery Drivers v. Wohl*, 315 U.S. 769, 776:

> "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas that are being disseminated."

In short, picketing may constitute a signal to responsive action on the part of union members generally, who are subject to the discipline of their organizations, or may otherwise have coercive significance apart from communication of facts and opinions. The circulation of leaflets among the public generally, as in the present case, carries no such connotation. Thus, the public was requested by the Union's handbill not to purchase specified products, and an explanation of the Union's position was given. No suggestion can be made, however, that the Union exerted any possible influence upon the recipients of the handbills beyond the persuasive power of the words themselves. Nor does the record show either disorder in the distribution or effect upon the establishments involved in terms of work stoppages or interference with deliveries. The constitutional test must accordingly be applied to the handbills in the case on the basis of what they appear to be on their face. The standards by which picketing might be adjudicated in similar circumstances are not applicable. The distinction is fundamental in constitutional law, for licensing and even lesser forms of regulation of the right to circulate literature are constitutionally forbidden. See, e.g., *Martin v. Struthers*, 319 U.S. 141; *Marsh v. Alabama*, 326 U.S. 501; *Talley v. California*, 362 U.S. 60; cf. *Near v. Minnesota*, 283 U.S. 697. Unlike picketing, therefore, leafleting of the kind involved in the present case must be treated as pure expression under the First Amendment.

It is true, of course, that the handbills in the present case expressed not only the Union's position in the labor dispute, but appealed for public support in withholding patronage from those who handled the products of the struck employer. The principles which protect the circulation of literature, however, do not lose their cogency because the handbills were intended to stimulate sympathetic response to the position of one of the disputants in a labor controversy. This is so even though the success of the response can be measured by an economic loss to the employer involved. Were the rule otherwise, there would be little if any scope for the constitutional protection of free expression. It is seldom that the expression of economic, political, social or other ideas is not at least tacitly accompanied by persuasion to side with the speaker or writer, thereby portending the possibility that pressures will be exerted in support of the views that are being advocated.

The point is made decisively in this Court's decision in *Thomas v. Collins*, 323 U.S. 506. The State of Texas there applied to a speech favoring unionism and soliciting union membership a statute which required all persons who solicited union membership to register and obtain an organizer's card. Texas argued that no question of free speech was presented, because its statute covered only the business activity of union solicitation. 323 U.S. at 526. This Court, however, ruled that a speech which discusses "the advantages and disadvantages of unions and joining them is protected . . . as a part of free speech," and that the exercise of this right could not be curtailed because it implicitly or explicitly invited responsive action on the part of the audience. 323 U.S. at 532. As further explained in the Court's opinion (323 U.S. at 534-535):

> "The speech was an essential part of the occasion . . . And the invitations, both general and particular, were parts of the speech, inseparable incidents of the occasion and of all that was said or done . . . A speaker in such circumstances could avoid the words 'solicit', 'invite', 'join'. It would be impossible to avoid the idea . . . In short, the supposedly clear cut distinction between discussion, laudation, general

> advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn to his intent and meaning . . . Such a distinction offers no security for free discussion . . . The vice is not merely that invitation, in the circumstances shown here, is speech. It is also that its prohibition forbids or restrains discussion which is not or may not be invitation. The sharp line cannot be drawn surely or securely."

So here, there is no basis for differentiating between handbilling and protected free speech on the ground that the handbills carried an implicit or explicit appeal to the public for support. If the facts of the Union's dispute with Servette may be freely publicized, including information as to the identity of stores which continued to handle Servette's products, it follows that appeals to support the Union cause by not buying such products during the strike also constitutes activity which is within the scope of the First Amendment. As in *Thomas v. Collins*, in publicizing the names of the retail stores who handled the struck products, "It would be impossible to avoid the idea" that the Union was inviting sympathetic action on the part of the public, for such invitations were "inseparable incidents of the occasion and of all that was said or done". 323 U.S. at 534.

Accordingly, the circumstance that the handbills took the form of an appeal for a withdrawal of patronage as to products involved in a labor dispute does not affect the applicability of the First Amendment. In determining whether the handbilling is within the scope of constitutional protection, therefore, it is appropriate to remind that "only considerations of the greatest urgency can justify restrictions on speech" with which the First Amendment is concerned. *Speiser v. Randall*, 357 U.S. 513, 521. "In each case [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Dennis v. United States*, 341 U.S. 494, 510. We turn to the question of whether there is involved in the distribution of handbills in the present case a substantive evil of such proportions as to justify a prohibition of communication.

B. The Possibility That Store Owners May Cease Doing Business With the Struck Employer to Avoid a Withdrawal of Consumer Patronage Caused by Handbilling Does not Provide a Permissible Reason to Prohibit Communication.

1. *The possibility that the store owners will suffer loss of patronage*—The contention that Congress could validly inhibit the Union's distribution of handbills in this case necessarily rests upon the possibility that members of the public, having been informed by the handbills, may choose not to patronize the stores which handle Servette's goods, and thereby create an economic pressure upon such stores to cease doing business with Servette. It may readily be conceded that the foregoing possibility exists. Indeed, it is not likely to be denied that the Union hoped for a public response to its handbilling activity that would demonstrate to the store owner that continued handling of Servette goods during the strike was not profitable. The economic loss, however, which the store owner may suffer in these circumstances—and it does not advance analysis to call it economic coercion—does not justify curtailment of the activity which occasions it. To conclude otherwise would be to condition the protection of the First Amendment upon a showing that the speech or writing could not be effectual, a view that scarcely expresses confidence in the concept of freedom of expression which is written into our fundamental law.

We do not suggest that Congress is generally forbidden to regulate conduct in the field of labor relations which is calculated to interfere with selling and buying. The Labor Act's prohibition against work stoppages to induce an employer to cease doing business with another employer with whom a union has a labor dispute is a familiar example of permissible regulation. And, as this Court has made clear, encouragement of this kind of economic pressure upon employers not directly involved in the dispute is not immunized from governmental restraint because it is accomplished by written or oral communication. *I.B.E.W. v. National Labor Relations Board*, 341 U.S. 694; Cf. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490.

Pressures of this nature, however, are altogether different in constitutional contemplation that those which result from an uncoerced and free response of the consuming public, acting upon their independent predilections in response to information made available to them by handbills. As we have shown, the communications which are challenged in the present case, are not signals to action, or incidents of a program to be carried out by persons subject to the discipline of the Union. The handbills have done no more than feed information respecting a particular labor dispute into the market place of ideas and opinions of persons who may or may not be interested. In legal effect, the activity is no different than the promotion by labor organizations of a "Buy Union Label" campaign. Such a general appeal, unaccompanied by control over responses of those to whom the appeal is made, may or may not result in persuading a sufficient number of consumers to take a stand that will bring about a diminution of profits by non union businesses. The vagaries interacting ideas and attitudes toward labor disputes, however, has never been thought sufficient to preclude a free exchange of ideas on the ground that consumers may, in consequence of the message conveyed to them, withhold patronage from one or another seller of goods. In *Talley v. California*, 362 U.S. 60, for example, handbilling was carried on to induce a consumer boycott against a group of merchants, but the economic hurt was not considered a factor for disallowing constitutional protection. Cf. *Terminiello v. Chicago*, 337 U.S. 1, 4. "Free trade in ideas means free trade in the opportunity to persuade to action, not merely to describe facts . . ." *Thomas v. Collins*, 323 U.S. 516, 537. And as observed by this Court in *Wood v. Georgia*, 370 U.S. 375, 389, "Under our system of government, counter-argument and education are the weapons available to expose these matters, not abridgement of the rights of free speech and assemble."

Accordingly, the constitutional impediment to restraint of the handbilling activity in this case is not circumvented even if it

were to be assumed (but see *infra*, pp. 23-30), that its consequence was economic "coercion" or "threats" within the meaning of those words as used in Section 8(b)(4)(ii) of the Act. There is no escape for any person or any business from "coercion" resulting from differing responses to a free and open discussion of labor disputes, short of stopping discussion altogether. This, we submit, cannot constitutionally be accomplished by governmental action.

It should be noted that the court below has reached the same conclusion in a case involving facts closely analogous to those in the present case. Thus, in *National Labor Relations Board v. I.A.M., Local 942*, 263 F. 2d 796 (C.A.9), a labor organization published a newspaper in which it placed on its "We Do Not Patronize" list the name of an employer which refused to recognize the union and enter into a union security agreement with it on the ground that the union did not represent a majority of its employees. The newspaper was circulated throughout the community, particularly to union members. The Board concluded that the distribution of the "We Do Not Patronize" list constituted an unfair labor practice in that it brought economic pressure to bear upon the employer and its employees, thus constituting restraint and coercion with respect to the question of employee organization. The court of appeals, however, rejected the Board's reasoning, and adopted instead that of the Trial Examiner who determined that the circulation of the "We Do Not Patronize" list was protected by Section 8(c) of the Act, the so-called "free speech" provision.[1] Quoting from the Trial Examiner's Report, because the Court was "so impressed with his reasoning", the opinion states (263 F. 2d at 799):

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1. Section 8(c) provides that "The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, or graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

As this Court has noted, Section 8(c) serves the function in the Act of "safeguarding freedom of speech". *National Labor Relations Board v. Denver Building Trades Council*, 341 U.S. 675, 690.

> "It is true that business operations employing union labor will be preferred by some customers and avoided by others solely upon the basis of that factor . . . So it may well be said that the selection of a union representative is often or perhaps always made in a climate not entirely free from elements which have a coercive quality. These elements are a part of the very fabric of industrial and commercial life quite beyond the reach of any conceivable statutory remedy."

The Court concludes, following the foregoing quotation, that (263 F. 2d at 799):

> "We consider the conduct of Union of listing and persuasion, excepting picketing, to be within the general area of protection of the First Amendment guaranteeing freedom of speech."

In the light of the foregoing, Sherman Act cases in which this Court has declined to exempt handbilling from its finding of illegal boycott activity on the part of labor organization officials have no application in the present situation. Thus, in *Gompers v. Bucks Stove*, 221 U.S. 418, and *Loewe v. Lawlor*, 208 U.S. 274, the Court rested its findings of illegal conspiracies in restraint of trade on strike activity which included, in part, the publication of boycott notices against firms which did business with the struck employers. The Court's conclusion, however, was based on the circumstance that the notices constituted directives issued to labor organizations and their members to exert boycott pressures as part of an overall conspiracy, worked out within the context of internal union agreement and discipline. As stated in *Gompers v. Bucks Stove, supra*, 31 Sup. Ct. at 497, "In the case of an unlawful conspiracy, *the agreement to act in concert when the signal is published* gives the words 'Unfair', 'We Do Not Patronize', or similar expressions, a force not inhering in the words themselves, and therefore exceeding any possible right of speech which a single individual might have" (emphasis added). The principle in such cases is the same as that recognized more recently in *I.B.E.W. v. National Labor Relations Board*, 341 U.S. 694, 701, 705, i.e., that

expressions "amounting to 'bare instigation'" of work stoppages in violation of prohibitions against secondary boycotts "carries no unconstitutional abridgement of free speech".

This principle, however, has no application where, as here, there is no "signal" aspect to the circulation, but rather simply an effort to persuade members of the public at large, who are quite beyond the scope of the Union's control, to exercise their individual and independent choices in patronage in a manner that will support the Union's cause. The distinction was made explicit in a concurring opinion of Chief Justice Stone in a Sherman Act case which succeeded the decisions discussed above. Thus, referring to notices distributed by a union which accused a manufacturer of beer of being unfair, and requested the public not to purchase the "unfair product" (necessarily from businesses not directly involved in the dispute), Chief Justice Stone remarked (*United States v. Hutcheson*, 312 U.S. 219, 243):

> "Publication, unaccompanied by violence, of a notice that the employer is unfair to organized labor and requesting the public not to patronize him is an exercise of the right of free speech guaranteed by the First Amendment which cannot be made unlawful by Act of Congress."

The present case thus is not one involving an organized interference with the business of the retail stores through an exercise of economic power subject to the control of the Union. It is rather one involving the dissemination of information and appeals to passersby whose separate responses are neither controlled nor predictable, but will at least be informed by the contents of the handbills. It is the function of the First Amendment to protect the right of advocates to so inform the public, even where the public's response may incur economic hardship.

2. *The possibility that the store owners may cease doing business with Servette*—The cessation of business between store owners and Servette that occurred in this case is attributable to the same interacting consumer forces that are, or are thought to be, responsible for whatever economic pinch which the retail

stores might have felt as a result of the handbilling. The constitutional principles discussed above thus apply with equal force to defeat the argument that such a cessation of business justifies governmental restraint. If a labor union is free to identify to the public the products of an employer with whom it has a labor dispute, that freedom necessarily overrides, if it is to be at all meaningful, considerations based on radiating disruptions of normal business relationships which may result from a discriminating exercise by members of the public of their power of patronage.

It may be contended, however, that the cessation of business between the employer who is primarily involved in a labor dispute and those who are not has been made an illegal labor union objective by Section 8(b)(4)(B) of the Act, and that Congress is constitutionally entitled to forbid the use of free speech in attaining unlawful objectives. Of course, the Constitution does not immunize incitement to the commission of a criminal act. See, e.g., *Fox v. Washington*, 236 U.S. 273. Nor can oral or written expressions escape restraint if they constitute an "integral part of conduct in violation of a valid . . . statute." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490. The handbills in the present case, however, sought no disobedience of law. It is entirely lawful for the public to withhold patronage of firms which do business with an employer whose employees are on strike, even though the public thereby influences such firms to cease handling the struck products. It is also lawful for the retail stores in this case to cease doing business with Servette during the strike, whether voluntarily or in response to consumer pressure. As stated by this Court (*Local 1907, Carpenters Union v. National Labor Relations Board*, 357 U.S. 93, 99-100):

> "A boycott voluntarily engaged in by a secondary employer for his own business reasons, perhaps because the unionization of other employers will protect his competitive position or because he identifies his own interests with those of his employees and their union, is not covered by the statute. Likewise, a union is free to approach an employer to persuade him to engage in a boycott, so long as it refrains

from the specifically prohibited means of coercion through inducement of employees."[2]

Accordingly, it is not enough to defeat the constitutional protection of handbilling in this case to argue that the Union activity was in furtherance of an unlawful objective. Congressional policy in this area of the law does not make a blanket condemnation of a cessation of bussiness relations in consequence of labor controversies. Nor would such a step be constitutionally permissible so as to authorize the proscription of the free flow of information and discussion concerning the dispute in the uncontrolled public market place of ideas. If avoidance of interference with business between a struck employer and neutral employers is a legitimate legislative objective, regulation must nonetheless stop short of censorship of publications relating to the strike. As pointed out by Chief Justice Stone (see p. 19, *supra*) the Constitution protects the distribution of notices that an employer involved in a labor dispute is "unfair". This constitutional guarantee is not so evanescent as to apply where the employer sells his products at retail, but not where he sells them at wholesale and a withdrawal of consumer patronage would necessarily affect a "neutral" retail business, and perhaps prompt the latter to cease handling the products involved. The short of the matter is that statutory protection which Congress may afford to normal business intercourse between employers involved in labor disputes and others cannot realistically reach the pressures which the public exerts in such situations, nor can it impede free access to information which may promote such pressures without undercutting the constitutional freedom of discussion which underlies our system of government.

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2. For the reasons stated in the Board's brief in this case relating to the first question presented, the 1959 amendments to the Act do not affect the continuing applicability of this statement of the law, except to the extent that the neutral employer is now protected against other forms of coercion in addition to that of work stoppages. It is not open to question, however, that a retail store is free to cease handling products in deference to consumer "coercion", whether based on disapproval of the quality of the product or sympathy for a union involved in a labor dispute.

It is well to recall that the concept of free speech incorporated into the First Amendment was formulated against the background of pamphleteering which was in many respects like the handbilling involved in this case. The quarrel of colonial America was with England, and particularly with its restrictive tax impositions. A principal method of American patriots to protest England's actions, however, was to encourage the public to boycott colonial merchants who imported English goods. Handbilling to "brand with public infamy" anyone who imported English wares preceded the Boston Tea Party, and thereafter documents were circulated elsewhere in the colonies "threatening all who dealt in dutied tea with a severe social and economic boycott". Rayback, J. G., *A History of American Labor* (MacMillan, 1959) pp. 29-30, 32. The colonial merchants, no less than the retail stores in the present case, might in one view be described as neutrals to the primary controversy, but we do not believe that the Constitution was written to guaranty their protection against the effect of open discussion and the circulation of written ideas respecting the primary controversy, whatever the consequences to them in terms of consumer pressure.

Ultimately, the question in this kind of case must come down to whether the Constitution countenances governmental rules which deny the public access to information concerning the identity of persons who trade with employers with whom there is a labor dispute. As we have shown, no line, either practical or constitutional, may be drawn to separate the dissemination of such information from appeals to support the union cause. The possible consequences of free and open discussion to the businesses involved in terms of potential loss of profits must thus be balanced against the interests of our society in obtaining information and the views of the disputants. We think it clear that the First Amendment has struck the balance in favor of open discussion.

II. The Handbilling in This Case in Any Event Is Not Within the Proscription of Section 8(b)(4)(ii)(B) of the Act.

A. The Statutory Provisions Involved.

In relevant part, Section 8(b)(4)(ii)(B) of the Act makes it an unfair labor practice for a union:

> "to threaten, coerce, or restrain any person ... where ... an object thereof is: ... forcing or requiring any person to cease doing business with any other person."

As shown in the Motion, *supra*, p. 3, the Board has ruled that the foregoing language would be applicable to the Union's handbilling activity in this case except for the proviso which immunizes "publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer ..." We show below that, wholly apart from the effect of the proviso, the Union's peaceful handbilling in this case did not in any event "threaten, coerce, or restrain any person" within the meaning of these statutory words, and thus cannot be found an unfair labor practice.

In turning to the reasons which support this interpretation of Section 8(b)(4)(ii), however, it is appropriate to keep in mind the nature of the constitutional issues which would be created by a contrary interpretation. In view of these issues, every effort should be made to construe the statutory language "in the candid service of avoiding a serious constitutional doubt". *United States v. Rumely*, 345 U.S. 41, 47.

B. The Statutory Interdiction Against Threats, Coercion and Restraint Does Not Reach the Union's Handbilling Activity.

Upon the assumption that the statutory reference to threats, coercion and restraint includes every economic pressure to which a business may be subjected by union activity in a labor controversy, there would be little room for argument that the handbilling in this case did not fall within the proscription of Section

8(b)(4)(ii) of the Act. This assumption, however, cannot be made. Unsophisticated literalism forms "a hazardous basis for the explication of major legislative enactments" (*Local Lodge No. 1424 v. National Labor Relations Board*, 362 U.S. 411, 417-418, n.7), particularly those which are "the result of conflict and compromise between strong contending forces and deeply held views . . ." *Local 1976, Carpenters v. National Labor Relations Board*, 357 U.S. 93, 99.[3]

Indeed, the selection of the statutory words "threaten, coerce or restrain" was not made with the thought of using commonplace language in its ordinary meaning, nor were the words originated with the adoption of Section 8(b)(4)(ii) in 1959. They were patterned after the proscription in Section 8(b)(1) of the Act against union "restraint or coercion" which had been adopted in 1947. It was the intention of Congress in 1959 that the newly added language in Section 8(b)(4)(ii) should be given the same interpretation as the similar language in the pre-existing provision.

Thus, the language in question first appeared in the administration bill, S. 738, which was one of several bills introduced in the 86th Congress to amend the Act.[4] In explaining its import during hearings on the bill, Secretary of Labor Mitchell stated to the Senate Subcommittee on Labor that "prior interpretations" under Section 8(b)(1) of the Act "will be extended to those provisions of the proposed bill". Hearings, Subcommittee on Labor on Bills Pertaining to Labor-Management Reform, 86th Congress, 1st Sess., p. 410. Accordingly, the scope of the terms "threaten, coerce, or restrain" must be delineated in terms of decisions which have interpreted the provision from which these words were taken.

The leading and definitive case in point is *National Labor Relations Board v. Drivers Local 639*, 362 U.S. 274. The question

3. See also Judge Learned Hand's warning that "There is no surer way to misread any document than to read it literally". *Guiseppi v. Walling*, 144 F.2d 608, 624 (concurring opinion), aff'd 324 U.S. 244.

4. See Vol. I, Legislative History of the Labor Management Reporting and Disclosure Act of 1959, (hereafter referred to as Leg. Hist.) p. 142.

in that case was whether the "restrain or coerce" language of Section 8(b)(1)(A) of the Act proscribed peaceful picketing to compel the commission of an unfair labor practice by the employer, i.e., recognition of a labor organization as the exclusive representative of his employees at a time when it had not been so designated by a majority of the employees. The Board argued that recognition of a union in such circumstances constituted an obvious and literal restraint upon the exercise by the employees of their right of free choice with respect to their representation. This Court rejected the contention, admonishing against applying "the vague language [of Section 8(b)(1)(A)] to the limits which, read literally, the words might permit." *National Labor Relations Board v. Drivers Local 639*, 362 U.S. 274, 291-292. It was the Court's conclusion that this language, read in the light of the limited problem to which it was addressed, was confined to "union tactics involving violence, intimidation, and reprisal or threats thereof". 362 U.S. at 290. See also, *National Labor Relations Board v. Lodge 942, I.A.M.*, 263 F. 2d 796, 800, holding that it would require "a clearer mandate from Congress than the general terminology of [Section 8(b)(1)(A)]" to find that peaceful circulation of a "We Do Not Patronize" list was forbidden by the Act. The lesson of these decisions is that peaceful union activity of the kind involved in this case is not within the pale of the language which Congress selected in Section 8(b)(4)(ii) of the Act.

The legislative history of Section 8(b)(4)(ii) confirms the foregoing conclusion. The language of this provision was included in the administration bill, S. 748, and also in the bill which was passed by the House. The Senate bill, as reported and passed by the Senate, did not amend the pre-existing language in this respect. Statements by the supporters of the proposed amendment during the Congressional debates evince an intent to protect neutral employers from threat of strike action, as well as from strong arm tactics, but there was no expression of an

intent to cover peaceful non-picketing communication.[5] On the contrary, there was general acknowledgment during the debates that Section 8(b)(4)(ii) was not intended to reach traditional modes of free speech. Thus, when Congressman Griffin was asked on the floor of the House about the application of the proposed amendment to appeals made at the customer entrances of stores, he replied (105 Daily Cong. Rec. 14339, II Leg. Hist. 1615): "Of course, this bill and any other bill is limited by the constitutional right of free speech". Similarly, Congressman Kearns, addressing himself to a proposal containing the same language now under consideration, stated (105 Cong. Rec. A 4308, II Leg. Hist. 1750):

> "In addition, a ban is placed on 'threats, coercion, or restraint' of any person where the object is one of those proscribed by Section 8(b)(4), and contracts which cause an employer to engage in a secondary boycott are outlawed. Thus peaceful persuasion of secondary employers would be permitted but could not be carried to the point of threat or made part of a contract. The line drawn is the one between peaceful persuasion by the union and 'strong arm' tactics." (Emphasis supplied.)[6]

From the foregoing, it is apparent that peaceful handbilling was not intended to be included within the scope of the phrase "threaten, coerce or restrain". It has been contended, however, that the publicity proviso to Section 8(b)(4) (see p. 23, *supra*), which was added in 1959, evinces a different intent on the part of Congress. Although there is no express support for the posi-

5. The following statements are illustrative:

Senator Goldwater (105 Daily Cong. Rec. 5764, II Leg. Hist. 1079):

> "Threats of a strike or picketing made directly to an employer can be effective as the strike or the picketing itself."

Analysis of the Landrum-Griffin proposal submitted by Congressman Griffin (105 Daily Cong. Rec. 13092, II Leg. Hist. 1523):

> "This bill makes such coercion [threats against neutral employers of a 'strike or other economic retaliation'] unlawful."

6. It is also significant that Congressional proposals to broaden the coverage of Section 8(b)(4)'s language to include "economic coercion" and "inducement" of neutral employers were defeated. See II Leg. Hist., pp. 1193-1198, 105 Daily Cong. Rec. 3510-3511.

tion in the legislative history, the point of the argument is that by excepting certain kinds of peaceful publicity from the scope of Section 8(b)(4)(ii), Congress meant to prohibit all such publicity that didn't satisfy the proviso. The argument necessarily makes the false assumption that any and every form of publicity directed against neutral firms which handle struck products in a labor dispute involves threats, coercion and restraint.

In any event, the argument that the proviso implies that Section 8(b)(4)(ii) includes peaceful handbilling cannot be supported. The legislative history of the publicity proviso shows that its adoption was to emphasize and clarify the limited scope of the "threaten, coerce, and restrain" language, and not to provide an indirect means of broadening that language. Thus, the history of the proviso is traceable to a nation-wide address by President Eisenhower during the debate on the 1959 amendments to the Act in which he proposed a ban against picketing at a retail store in furtherance of a dispute with a manufacturer whose products were sold by the retail store.[7] Upon recognizing that the bill passed by the House could be construed to cover such picketing, the Senate conferees insisted that a proviso be added to Section 8(b)(4) to make clear that unions were at least free to use non-picketing means of communication at the neutral's premises in the kind of situation mentioned in the President's speech. This history of the adoption of the proviso has been explained by Archibald Cox, now Solicitor General of the United States, who worked closely with the Senate Committee during the legislative consideration of the 1959 amendments (44 Minnesota Law Review, 57, 274):

> "Standing alone, as it did in the Landrum-Griffin bill, this language seemed to invite rulings that organizing a consumer boycott of a store which sold the products of a manufacturer with whom the union was engaged in a labor dispute would become an unfair labor practice. A majority of

7. The President's address is reported in II Leg. Hist. 1842.

the Senate Conferees objected to this change in the law. There is some reason to think that originally the Republicans and Southern Democrats among the House Conferees failed to realize that the words were broad enough to reach consumer boycotts and would have agreed to eliminate the prohibition but President Eisenhower's radio and television appearance placed them in a dilemma. The speech contained an example of secondary picketing which had either to be read as inducement of employees to engage in a secondary strike, in which case the President had displayed ignorance by demanding that Congress outlaw conduct which had been unlawful for twelve years, or a demand for a law against picketing which caused a secondary consumer boycott. The sponsors of the Landrum-Griffin bill stood immovably upon the second alternative. The Senate Conferees, therefore, sought to narrow the restriction to the exact illustration used by the President. This is the reason for the proviso which permits unfair lists, radio broadcasts, newspaper advertising, sound trucks and every other form of publicity except picketing for the purpose of inducing consumers to boycott an unfair product or a distributor who does business with an unfair producer. It is qualified by the distinction which we noted in Section 8(b)(7) between appeals to individuals as members of the public, whether union members or not, and concerted refusals to work backed by the pressure and possibly the discipline of an organized group. I suspect that the distinction between signal and publicity picketing would have been introduced if it were not for the curious turn of events which made it politically impossible for the sponsors of the Landrum-Griffin amendments."

As the foregoing commentary indicates, the proviso was intended to be illustrative of the situations which Congress did not wish to include within the "coerce or restrain" language of Section 8(b)(4)(ii), i.e., peaceful communications identifying to consumers the persons who were doing business with an employer with whom a union had a primary labor dispute. The proviso was referred to as a "clarification", rather than a comprehensive description of the situations to which Section 8(b)(4)(ii) did not

apply. See 105 Daily Cong. Rec. 17181, II Leg. Hist. 1454; 105 Daily Cong. Rec. 16539, II Leg. Hist. 1712. The same point underlies the explanation of the proviso made to the Senate by President Kennedy, who at that time was Chairman of the Senate Subcommittee on Labor. Thus, President Kennedy, stated on the floor of the Senate before passage of the Conference Agreement (105 Daily Cong. Rec. 16254-16255, II Leg. Hist. 1388-1389):

> "Secondly, the House bill prohibited the union from carrying on any kind of activity to disseminate informational material to secondary sites . . . Under the language of the conference, we agreed there would not be picketing at a secondary site. What was permitted was the giving out of handbills or information through the radio, and so forth."

See also, President Kennedy's statement at 105 Daily Cong. Rec. 16414, II Leg. Hist. 1432:

> "We were not able to persuade the House conferees to permit picketing in front of that secondary shop [which sold goods of a manufacturer with whom there was a labor dispute], but we were able to persuade them to agree that the union shall be free to conduct informational activity, short of picketing. In other words, the union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory picketing in front of a secondary site."

For other statements acknowledging that the proviso was intended to exemplify rather than restrict the situation in which non-picketing appeals could be made, see 105 Daily Cong. Rec. A8274, II Leg. Hist. 1823; 105 Daily Cong. Rec. 16637, II Leg. Hist. 1722.[8]

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8. The use of a proviso to clarify existing law is not an unusual phenomenon in the 1959 amendments to the Act. Thus, a proviso was also added to Section 8(b)(4)(B) to make it clear that a primary strike and primary picketing are lawful. As the decisions had established, and as Congress well knew, this proviso did not except from the Act conduct that otherwise would have been covered. See *Local 761, I.U.E., v. National Labor Relations Board*, 366 U.S. 667, 672.

It is thus apparent that the publicity proviso was adopted to erase any fear that Section 8(b)(4)(ii) might apply in situations where, as here, unions advertise by peaceful non-picketing methods the fact that specified neutral employers are doing business with a primary employer. The circumstances surrounding the adoption of the proviso therefore support the interpretation of the language in question as established by the decisions relating to Section 8(b)(1)(A). See pp. 24-25, *supra*. To construe the statutory language more broadly would extend the clause "threaten, coerce or restrain" to cover peaceful communications that it was not designed to cover, and would derogate the spirit and purpose of the clarifying proviso. Compare, *Drivers Local 639 v. National Labor Relations Board*, 362 U.S. 274.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Union's handbilling activities in this case cannot be found to constitute an unfair labor practice, irrespective of the applicability of the proviso to Section 8(b)(4)(B). Accordingly, the judgment of the court below should be reversed with directions to affirm the order of the Board insofar as it dismisses those portions of the complaint dealing with handbilling activity.

September, 1963

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(Appendix Follows)

Appendix

The relevant provisions of the Constitution of the United States are as follows:

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government of a redress of grievances.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

UNFAIR LABOR PRACTICES

Sec. 8 . . .

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: . . .

* * * * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other

employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * * * * *

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

* * * * * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.